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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JONATHAN HOUSE, Defendant-Appellant.	DC # CR-06-2332-TJW Southern California DEFENDANT'S MEM. IN SUPPORT OF MOTION UNDER 28 U.S.C. § 2255

Defendant Jonathan House, by and through counsel, submits this Memorandum in support of his Motion under 28 U.S.C. § 2255.

On November 27, 2006, pursuant to a plea agreement, defendant pleaded guilty to one count of possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4). On May 31, 2007, this Court sentenced Mr. House to 63 months' imprisonment. Mr. House did not file a timely notice of appeal.

The plea agreement contained a term under which Mr. House waived his right to appeal. At the change of plea hearing, however, this Court did not inform Mr. House about the term purporting to waive the right to appeal.

After this Court imposed a sentence of 63 months' imprisonment, defendant House spoke to his former attorney, Stephen Hoffman, about appealing. Mr. House asked whether he could appeal, and Mr. Hoffman responded that he could not. Hoffman Decl. at 1. Counsel has conceded that he did not realize that the Court did not advise Mr. House that he was waiving his right to appeal pursuant to the plea agreement. Id. at 2. Counsel also did not consider whether that failure affected the validity of the waiver of the right to appeal. Id. Under the circumstances, counsel's advice that Mr. House could not appeal was mistaken, fell below the standard of a reasonable attorney, and prejudiced the defendant. Therefore, this Court should grant the § 2255 motion.

COUNSEL'S ADVICE TO THE DEFENDANT REGARDING HIS WAIVER OF THE RIGHT TO APPEAL WAS MATERIALLY MISTAKEN, BECAUSE THERE IS A REASONABLE PROBABILITY THAT THE WAIVER OF THE RIGHT TO APPEAL WAS INVALID.

At the change of plea hearing, this Court did not inform Mr. House that he was waiving his right to appeal and to collateral attack pursuant to the plea agreement. Federal Rule of Criminal Procedure 11(b)(1)(N) requires that, during the plea colloquy, a district court determine that the defendant understands the terms of any plea agreement provision waiving the right to appeal or to collaterally attack the sentence. This did not occur here: no mention of the waiver of the right to appeal was mentioned. Thus, the Court violated Rule 11.

The Rule 11 violation stemming from the court's failure to advise the defendant that he was waiving his right to appeal pursuant to a plea agreement constitutes plain error. United States v. Arellano-Gallegos, 387 F.3d 794 (9^{th} Cir. 2003). More significant, the violation of Rule 11 rendered the waiver of the right to appeal invalid. See United States v. Portillo-Cano, 192 F.3d 1246, 1250-52 (9th Cir. 1999). Accordingly, there is at least a reasonable probability that Mr. House retained the right to appeal.

After sentencing, in response to Mr. House's question about filing an appeal, counsel did not inform him about the violation of Rule 11 or about the effect that violation might have had on the validity of the waiver of the right to appeal. Instead, when Mr. House asked about appealing his sentence, counsel told him that nothing could be done. Hoffman Decl. at 1. This advice was materially mistaken. In fact, Mr. House could have filed a notice of appeal to the Ninth Circuit. It is likely that such an appeal would not have been subject to dismissal based on the waiver contained in the plea agreement.

DEFENDANT HOUSE DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL IN CONNECTION WITH ADVICE REGARDING AN APPEAL.

Defendant House was deprived of the effective assistance of counsel in connection with the decision whether to appeal. An ineffective assistance claim has two prongs: deficient performance by counsel which prejudiced the defendant. Strickland v. Washington, 486 U.S. 664 (1984). The defendant's right to the effective assistance of counsel requires his attorney to file a notice of appeal if the defendant requests that he do so. Rodriguez v. United States, 395 U.S. 397 (1969); Campusano v. United States, 442 F.3d 770, 774-75 (2d Cir. 2006). This is true even if counsel advises the defendant against filing a notice of appeal, so long as the defendant insists. Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000). Counsel must file a notice of appeal at the defendant's request even if the defendant has waived his right to appeal, or counsel believes the appeal would be frivolous. United States v. Sandoval-Lopez, 409 F.3d 1193, 1195 (9th Cir. 2005); accord Campusano, 442 F.3d at 775-77; United States v. Garrett, 402 F.3d 1262, 1266 (10th Cir. 2005); United States v. Gomez-Diaz, 433 F.3d 788, 790-92 (11th Cir. 2005).

In Flores-Ortega, the Supreme Court explained the relationship between effective assistance and the right to appeal. Counsel must consult with the defendant regarding appeal when

> there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Id. at 480. When a client expresses a desire to appeal, it is clear that counsel is obliged to consult with his client. 528 U.S. at 478-79.

If counsel is required to consult with his client regarding an appeal, it logically follows that any advice that counsel provides regarding the availability of an appeal must be reasonably accurate. Here, while counsel consulted with his client, the advice he provided, that no appeal was available, was mistaken. Counsel did not advise Mr. House about the Rule 11 violation, nor regarding any effect that the Rule 11 violation might have had on the validity of the waiver of the right to appeal. Thus, counsel's performance was deficient.

Mr. House was prejudiced, because counsel's mistaken advice resulted in the loss of his appeal. Mr. House conveyed his desire to appeal to his attorney. He did not appeal because of the incorrect advice. Prejudice is demonstrated if the defendant can show that he would have appealed had counsel not performed deficiently. Roe v. Flores-Ortega, 528 U.S. at 483. Had Mr. House been advised of the Rule 11 violation and its effect, he would have appealed. Accordingly, he has demonstrated prejudice.

The remedy for the ineffective assistance of counsel is to vacate and re-enter the judgment, allowing a fresh appeal. United States v. Gaither, 245 F.3d 1064, 1068 (9th Cir. 2001); United States v. Pearce, 992 F.2d 1021, 1021 (9th Cir. 1993). Defendant, therefore, respectfully requests this Court to vacate and re-enter its judgment.

Dated: October 25, 2007

Respectfully submitted,

LAW OFFICES OF ALAN ELLIS

By: /s

KAREN L. LANDAU

CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over the age of 18 years and not a party to the within cause; my business address is 2626 Harrison St., Oakland, California 94612.

On October 25, 2007, I served a copy of the attached

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upon the interested parties herein, through ECF. The parties served, both of whom are registered for electronic filing, are

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 29, 2007.

/s
Karen Landau